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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUIS CIPRIAN AVILES, Defendant and Appellant.	G046280 (Super. Ct. No. 10CF0705) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Luis Ciprian Aviles of four counts of lewd acts on a child under age 14 (Pen. Code, § 288, subd. (a)), and two counts of sexual penetration with a child 10 years old or younger (Pen. Code, §§ 288.7, subd. (b), 289). The jury made special findings that defendant committed lewd acts on a child on more than one victim. (Pen. Code, §§ 667.61, subd. (c), 1203.066, subd. (a)(7)). Defendant was sentenced to a prison term of 60 years to life.

On appeal, defendant contends he received ineffective assistance of counsel when his counsel did not object to certain hearsay testimony that was admitted as a spontaneous declaration under Evidence Code section 1240. Finding neither ineffective assistance nor prejudice from counsel's decision not to object, we affirm.

FACTS

The two victims are V.C., who was four years old at the time of the molestation described below, and C.D., who was five years old at the time. They are cousins. The defendant, age 50 at the time, was the grandmother's boyfriend. V.C., her parents, C.D., and C.D.'s mother all lived at the grandmother's house. Defendant spent the night at the grandmother's house almost every day, but lived in his own trailer nearby.

On January 19, 2008, at approximately noon, the grandmother dropped V.C. and C.D. off at defendant's home while the grandmother and C.D.'s mother went to lunch. After the adults left, defendant put on a pornographic video. Defendant then pulled down V.C.'s underwear, kissed her, performed oral sex on her, sucked her breasts, rubbed his penis against her buttocks, and penetrated her vagina with his finger. Afterwards V.C. felt burning when going to the bathroom. Defendant performed many of the same acts on C.D. Defendant also exposed his penis to the victims. Both victims witnessed the other's molestation.

Defendant had previously molested both victims. He had previously performed oral sex on V.C. while at the grandmother's house. And he had also molested C.D. C.D. previously slept in the same bed as defendant and the grandmother. On more than 20 occasions, defendant took off her diaper and digitally penetrated both her vagina and anus. Defendant told C.D. not to tell her mother because the police would be after him.

Defendant did not stop molesting C.D. after the incident on January 19, 2008. He again digitally penetrated C.D.'s anus and vagina when she subsequently visited on vacation.

After the molestation on January 19, 2008, at approximately 4:30 p.m. that same day, C.D. and V.C. approached V.C.'s father O.C., and told him about the molestation. V.C.'s statements to O.C., which are described in detail below, are the hearsay statements at the center of this appeal. The next day, O.C. reported the incident to the police.

The police came out the same day that O.C. reported the incident and interviewed both V.C. and C.D. Both victims described the molestation defendant had inflicted on them. During the interview, V.C. was crying and the interview had to be suspended multiple times to permit V.C. to compose herself. It was difficult for V.C. to discuss what happened. The officer attempted to interview the grandmother and C.D.'s mother, but found both uncooperative.

After the interviews, V.C. and C.D. were taken for a physical exam. There were no physical findings. According to the People's expert, physical findings are only present in approximately 5 to 10 percent of sexual assaults on children under 10 years old.

Approximately two weeks later, V.C. and C.D. were brought in for interviews with a social worker from the Child Abuse Services Team (CAST). During

the interview, V.C. extensively described what happened to her and C.D. C.D. likewise described the molestation, though somewhat more reluctantly.

After the interviews took place, the police sought to locate defendant but defendant had fled to avoid arrest.

C.D.'s mother, who was separated from C.D.'s father, did not inform the father about the molestation allegations. C.D.'s mother was concerned that if C.D.'s father found out, he would take her to court to obtain greater custody of C.D. and she would lose visitation rights.

Approximately two years later, in March of 2010, C.D., now seven years old, finally disclosed to her father that defendant had molested her. C.D.'s father immediately packed the family into a car and drove from Texas, where they lived, to California to file a police report. The following day, C.D. was given a second CAST interview where she offered greater detail than her previous interview about what had happened on January 19, 2008.

At around the same time, the police visited the grandmother's home a second time to investigate C.D.'s most recent complaint. Defendant was present at the house this time. The police asked defendant his name, but he falsely identified himself as "Fernando Guzman," claiming he had no identification. Similarly, C.D.'s mother falsely told the police that defendant was a man named "Fernando Nagera," and offered to retrieve a pay stub to prove the false identity. Another individual at the house, however, identified defendant as "Luis" (his true first name). The police then threatened to have C.D. identify defendant, at which point C.D.'s mother reluctantly admitted "Fernando" was in fact defendant. C.D.'s mother refused to answer questions afterwards, and instead began to cry. She later pleaded guilty to child endangerment.

In April of 2011 the People filed an information charging defendant with four counts of lewd acts on a child under age 14 (Pen. Code, § 288, subd. (a)), and two counts of sexual penetration with a child 10 years old or younger (Pen. Code, §§ 288.7,

subd. (b), 289). The People alleged as a special circumstance that defendant committed lewd acts on a child on more than one victim. (Pen. Code, §§ 667.61, subd. (c), 1203.066, subd. (a)(7)).

The People moved in limine to admit V.C.'s statements to O.C. under the spontaneous declaration exception to the hearsay rule, Evidence Code section 1240. The People's offer of proof was as follows: O.C. "arrived home from work at approximately 4:30 p.m. on January 19, 2008. He asked [V.C.] to tell him what she did during the day. [V.C.] told him in Spanish, 'Luis me tacho', meaning 'Luis touched me.' [O.C.] asked her where Luis touched her and she told him 'Luis me tacho mi colita,' meaning 'Luis touched my vagina.' [O.C.] asked how and [V.C.] told him he inserted his finger. [V.C.] told [O.C.] that the defendant pulled down her pants and inserted his finger inside her vagina several times. Her vagina hurt and it burned to urinate." The trial court asked defense counsel if there was any objection to permitting the testimony, to which counsel replied, "No, your honor, there's no objection, assuming the foundation can be laid under [Evidence Code section] 1240." The trial court admitted the evidence, stating, "The foundation offered in the moving papers would appear to be sufficient. I'll just trust on the Defense, if there is anything lacking in the actual testimony, and the offer of proof then would be insufficient on the record, then, make sure you bring it to my attention."

At trial, O.C. testified, without objection, as follows: On January 19, 2008, after returning home from work at about 4:30 p.m., C.D. approached him and complained that defendant had molested her. While he was speaking to C.D., V.C. entered the room. V.C. also told him that she had been touched while at defendant's house. Specifically, V.C. pointed out to O.C. that she had been touched in her vagina; that defendant had penetrated her vagina with his finger; and she said she did not like it and that she was in pain. V.C. and C.D. were visibly unhappy.

V.C. and C.D. both testified at trial to the molestation. Also, the videos of the CAST interviews, in which V.C. and C.D. extensively describe the molestation, were

played for the jury and admitted into evidence together with written transcripts of the videos. Additionally, Officer Castellanos, the initial responder, testified to what V.C. and C.D. told him happened in his initial interview of the victims. The defense offered no evidence.

The jury convicted defendant on all counts and made special findings that defendant committed lewd acts on a child on more than one victim. (Pen. Code, §§ 667.61, subd. (c), 1203.066, subd. (a)(7)). The court sentenced defendant to a prison term of 60 years to life. Defendant timely appealed.

DISCUSSION

Defendant raises a single contention on appeal: that he was denied effective assistance of counsel because his counsel did not object to O.C.'s testimony regarding V.C.'s initial complaint to him that defendant had molested her. We disagree.

The federal and state Constitutions entitle a criminal defendant to the effective assistance of counsel. (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) This entitlement, vital to the adversarial process, helps ensure the defendant receives a fair proceeding and a just result. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).)

To prove an ineffective assistance claim, a defendant must show that (1) "counsel's performance was deficient," *and* (2) "the deficient performance prejudiced the defense." (*Strickland*, *supra*, 466 U.S. at p. 687.) A court need not "address both components of the inquiry if the defendant makes an insufficient showing on one." (*Id.* at p. 697.)

We measure the adequacy of counsel's performance by determining whether counsel's assistance was reasonable "under prevailing professional norms" (*Stickland*, *supra*, 466 U.S. at p. 688) and in light of all circumstances existing at "the

time of counsel's conduct." (*Id*. at p. 690.) Because defense counsel face a "variety of circumstances" and an array of "legitimate decisions" (*id.* at p. 689), a court must "accord great deference to counsel's tactical decisions" (*People v. Lewis* (2001) 25 Cal.4th 610, 674) and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (*Strickland*, at p. 689.) Furthermore, "[i]f the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.'" (*People v. Kipp, supra*, 18 Cal.4th at p. 367.) "Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

To prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.) "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (*Id*. at p. 695.)

Here, the record does not reveal why defense counsel decided not to object to O.C.'s testimony on hearsay grounds, nor was counsel asked to explain his decision. Thus we may reverse only if "'there simply could be no satisfactory explanation.'" (*People v. Kipp, supra*, 18 Cal.4th at p. 367.) We conclude there is a satisfactory explanation here — O.C.'s testimony was admissible under Evidence Code section 1240.

The Trial Court Did Not Err in Admitting O.C.'s Testimony Under Evidence Code Section 1240

Evidence Code section 1240 provides, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "'"To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.] Spontaneous statements are deemed sufficiently trustworthy to be admitted into evidence because '"'in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.'" [Citation.]'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809-810.)

Here, despite defense counsel's lack of objection, the trial court analyzed the People's offer of proof and determined that it satisfied Evidence Code section 1240. "As this is a factual question, we will uphold the trial court's determination if it is supported by substantial evidence. [Citation.] We review for abuse of discretion the ultimate decision whether to admit the evidence." (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) "Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] . . . [Citation.] In performing this task, the 'court necessarily [exercises] some element of discretion . . . .' [Citation.] [¶] Because the second requirement [(i.e. a timely complaint)] relates to the peculiar facts of the individual case more than the first or

third does [citations], the discretion of the trial court is at its broadest when it determines whether this requirement is met [citation]. Indeed, Dean Wigmore goes so far as to urge that the issue should be left 'absolutely to the determination of the trial court.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318-319; see 6 Wigmore, Evidence (Chadbourn rev. ed. 1976) § 1750, p. 221.) "'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*'" (*Poggi*, at 319.)

Although some cases have restricted the time lapse between the stressor and the statement to mere minutes (See *In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1130, abrogated on other grounds by *People v. Brown* (1994) 8 Cal.4th 746, 754) in cases involving young children, courts have indulged significantly longer lapses of time where the requirements of Evidence Code section 1240 are otherwise met.

For example, in *People v. Trimble* (1992) 5 Cal.App.4th 1225 (*Trimble*) a two-and-one-half year old witnessed her father murder her mother. Nearly two days later, once the child was taken from the father's presence, the child frantically described to a relative what she saw. The relative's testimony about the statement was admitted as a spontaneous declaration, and the defendant was convicted of murder. The Court of Appeal affirmed, finding the statement was properly admitted because the evidence indicated she was still in a state of excitement, and thus, particularly given the child's age, the hearsay was admissible: "The startling event she had witnessed and described was undoubtedly monumentally stressful for a child of that age." (*Id.* at p. 1235.)

Similarly, in *In re Emilye A.* (1992) 9 Cal.App.4th 1695 (*Emilye A.*) a two years and 11 months old minor was playing with her mother when she told her mother, "a day or two" after being molested (*id*. at p. 1713) that her father had given her an "owie" inside her vagina (*id.* at p. 1700). At a subsequent juvenile dependency hearing, the mother testified to these statements, but the daughter did not testify. (*Id*. at pp. 1700-

1701). The daughter was held to be a dependent of the court and custody was vested in the mother. (*Id*. at pp. 1704-1705.) On appeal, the father claimed ineffective assistance of counsel in that the daughter was not brought in to determine whether she was competent to testify. (*Id*. at p. 1711.) The court of appeal affirmed, finding no prejudice from any ineffective assistance because the daughter's testimony would have been cumulative to her hearsay statement, which properly admitted as a spontaneous declaration through the mother: "These circumstances, i.e., that the statements were made spontaneously, while in the midst of play, that they were made by a child sufficiently young that her reflective powers would be relatively unsophisticated, and that they were made while the minor was in pain [citation] all indicate that they were made under stress or excitement, while the declarant's reflective powers were still in abeyance." (*Id.* at p. 1713.)

Here, there was substantial evidence to support the trial court's ruling that V.C.'s out-of-court statement satisfied Evidence Code section 1240. There is evidence that V.C. was still under the stress of the molestation when she made her statement. As in *Emilye A.*, V.C. told O.C. she was still in pain at the time she made her statement. Further, on the following day when the police officer interviewed V.C., she was crying throughout the interview, to the point where the interview was interrupted multiple times so that V.C. could compose herself, evidencing continuing emotional distress. Further, there was significantly less time between the stressor and V.C.'s statement than in *Trimble* and *Emilye A*: approximately four hours. We find no abuse of discretion in admitting this evidence.

Defendant argues the trial court erred based on O.C.'s testimony that he did not perceive any abnormalities in the victims' behavior, nor did it appear to O.C. that they had been crying. While those were certainly relevant facts, they are not dispositive. (*People v. Poggi, supra,* 45 Cal.3d at p. 319 ["the fact that the declarant has become calm enough to speak coherently also is not inconsistent with spontaneity"].) Our review is

limited to determining whether substantial evidence supports the trial court's ruling and whether the court properly exercised its associated discretion. As set forth above, substantial evidence supports the ruling and there was no abuse of discretion.

Defendant also argues that, even if the trial court's original ruling was proper, defendant's counsel should have objected because of differences between the prosecution's offer of proof and O.C.'s testimony at trial. In particular, the offer of proof indicated that O.C. asked V.C. how her day was, and she responded by describing the molestation. At trial, O.C. testified that C.D. first approached him and complained of the molestation, that he did not ask any questions, and that V.C. offered her account of what happened after C.D. described the molestation. Arguably, however, the fact that V.C. offered her account *not* in response to a question only makes her statement more spontaneous. (*See People v. Poggi*, *supra*, 45 Cal.3d at p. 319 ["whether [the statements] were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity"].) Regardless, the distinction between the offer of proof and the testimony at trial was minor. Defense counsel could have reasonably concluded that such a minor variation between the offer of proof and the actual proof would not have changed the trial court's ruling.

Finally, the defendant analogizes the present case to *People v. Ramirez* (2006) 143 Cal.App.4th 1512 (*Ramirez*), but that case is distinguishable. There, a 16-year-old was raped. After the rape the victim took a shower and then asked the perpetrator to drive her home. She fell asleep in the car. The next morning, approximately five hours later, she awoke in pain and in an apartment she did not recognize. She stated to the occupants of the apartment that she had been raped but that she did not want to call her brother because she thought her brother would be angry. (*Id.* at pp. 1517-1519.) The trial court admitted the out-of-court statements made to the apartment occupants under Evidence Code section 1240. On appeal, the majority held it was error, finding, "the evidence indicates not only that [the victim] was *able* to

deliberate or reflect on what had occurred, but that she in fact did so." (*Ramirez*, at p. 1525.) According to the majority, the *content* of what [the victim] said indicated deliberation: "Contrary to the suggestion in the concurring opinion, it is not merely that [the victim] 'spoke clearly and distinctly, or was oriented to reality' that leads us to conclude that she engaged in a deliberative process, and thus, that the statements at issue do not come within the hearsay exception for spontaneous statements. [Citation.] In addition to these factors, and most important for purposes of our analysis, is the *content* of [the victim's] statements. [The victim] stated a number of times that she was worried about what her brother would do if he were to find out what had happened to her. These statements demonstrate that [the victim] in fact engaged in a deliberative or reflective process as to the subject matter of the statements at issue, and thus establish that her reflective powers were not '*yet* in abeyance.' In our view, the fact that [the victim] actually engaged in a deliberative or reflective process as to the subject matter of the statements at issue is dispositive." (*Id.* at p. 1526.)

We find no similar circumstance here. Unlike the victim in *Ramirez*, who was 16 years old, V.C. was only four years old and thus had limited deliberative faculties to begin with. (See *Emilye A., supra*, 9 Cal.App.4th at 1713 [stating that an almost three-year-old's statements "were made by a child sufficiently young that her reflective powers would be relatively unsophisticated"]; *Ramirez, supra*, 143 Cal.App.4th at p. 1533 (conc. opn. of Benke, J.) ["in making the determination of this mental state it may be necessary to consider the age of the declarant"].) Further, unlike *Ramirez*, nothing about the content of V.C.'s statements to O.C. indicates she had made deliberative conclusions about what happened. Rather, she simply relayed the events of the molestation.

In light of the evidence of continuing stress and physical pain, V.C.'s age, and the relatively short time lapse between the molestation and the statement, the trial court's pretrial ruling was supported by substantial evidence and admitting the evidence

was not an abuse of discretion. Defense counsel's decision not to object, therefore, was reasonable and was not ineffective assistance.

Defendant Was Not Prejudiced

Even if we were to find that V.C.'s out-of-court statements were inadmissible hearsay and that it was unreasonable for counsel to withhold objection, we would nonetheless affirm because defendant has not shown prejudice. Exclusion of O.C.'s testimony would not have affected the outcome.

The hearsay testimony at issue was cumulative of other testimony in the record. V.C. related the same facts in much greater detail during her extensive interview with a social worker at CAST, which was admitted into evidence under Evidence Code section 1360 without objection. And V.C. testified to the same facts at trial. There was no objection to that evidence at trial, and defendant does not contend on appeal the evidence was inadmissible. O.C.'s testimony, by contrast, was short, offered little detail, and was eclipsed by the extensive testimony from V.C.'s CAST interview and trial testimony. Further, the prosecutor's closing argument did not focus on V.C.'s statement to O.C., but instead focused on the CAST interviews and the trial testimony. As the prosecutor stated, "The best evidence is those CAST videos." Based on the cumulative nature of the evidence alone, we would find no prejudice. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 818, fn. 29 ["Even assuming [the declarant's] statements . . . were not spontaneous for purposes of Evidence Code section 1240, their admission could not have been prejudicial by any standard because they were identical to [other statements properly admitted], and were therefore cumulative"].)

Additionally, unlike the declarants in *Trimble, supra,* 5 Cal.App.4th 1225, and *Emilye A., supra,* 9 Cal.App.4th 1695, V.C. testified at trial. Thus defendant had the opportunity to cross-examine V.C., mitigating the prejudice of any out-of-court statements. (See *Ramirez, supra*, 143 Cal.App.4th at p. 1526 [In a rape trial, victim's

hearsay statements were erroneously admitted as spontaneous statements under Evid. Code, § 1240, but there was no prejudice because the victim testified and "[t]hus the jury did not have to rely solely on secondhand statements she made to third parties. Rather, it had the opportunity to hear from [the victim] directly and to judge her credibility. The [hearsay statements] were merely cumulative to [the victim's] testimony at trial"].)

Finally, the evidence of defendant's guilt was overwhelming. C.D.'s extensive testimony corroborated V.C.'s extensive testimony regarding the molestation. Defendant fled the police. He then lied about his identity when first confronted by the police. The defendant, on the other hand, put on no affirmative evidence and did not significantly impeach the People's evidence.

Given the cumulative nature of the testimony at issue, the fact that V.C. testified at trial, and the otherwise overwhelming evidence of defendant's guilt, we find that counsel's failure to object to O.C.'s hearsay testimony did not prejudice defendant.

DISPOSITION

The judgment of the trial court is affirmed.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.